The English courts have had the same difficulty presented to them. *Clidero* v. *Scottish Acc. Ins. Co.*, 29 Scottish Law Reporter 303. In this case the court decided in favor of the stricter interpretation, saying, "The question is, in the words of the policy, whether the means by which the injury was caused were accidental means. The injury being accidental in a sense that it was not anticipated, and the means which led to the injury as accidental, are two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental injury, but the means are exactly what the man intended to use and did use, and was prepared to use. The means were not accidental, but the result might be accidental. This does not fall within the description in the policy." This view is supported in *In re Scarr* [1905], 1 K. B. 387, 2 B. R. C. 358, and the English doctrine may now be regarded as settled in accordance with these two cases.

The most recent case on the subject, *New Amsterdam Casualty Co.* v. *Johnston* (Ohio 1915), 110 N. E. 475, follows this doctrine. In that case insured was accustomed to taking cold baths after exercising, and following a horseback ride took a cold plunge. Acute dilation of the heart resulted and he sues on his accident policy claiming that the injury is one effected solely and exclusively by external, violent and accidental means. The court held that the injury was not an accident within the meaning of the term, inasmuch as nothing occurred which the insured had not planned or anticipated, excepting the dilation and its consequences. The court in this case follows the reasoning of the English cases, saying that the contrary view is untenable, as it allows the result to determine the cause, and taking the stricter view, states that the injury cannot be regarded as caused by accidental means, as the injury resulted from ordinary acts, and was the natural consequence of those acts, and no unusual circumstance intervened.

R. H. N.

WHEN DO INJURIES "ARISE OUT OF" ONE'S EMPLOYMENT?—In the recent case of *De Filippis* v. *Falkenberg*, 155 N. Y. Supp. 761, the Appellate Division of the Supreme Court of New York was confronted with the question: are accidental injuries, arising from the sportive act of a co-worker, compensatable as injuries "arising out of the employment"?

The claimant was employed by the defendant as an operator of a buttonhole machine. Connected with the factory were two adjoining toilet rooms, with a partition between. Claimant employee entered one of the toilets at about two o'clock in the afternoon, which was during the regular working hours, and while there felt something strike her on the shoulder, whereupon she looked through an aperture in the partition, into the next room, and another employee thrust a pair of scissors through the aperture and into claimant's eye, destroying the sight. She brings this action under the WORKMEN'S COMPENSATION LAW, the material part of which is as follows: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this

article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment." (LAWS OF NEW YORK, 1914, Ch. 41, Art. 2, § 10.) The lower court gave judgment for the plaintiff under this statute, but the decision was reversed on appeal, on the ground that the injury, although accidental and in the course of employment, did not "arise out of" the employment of the claimant.

Since the New York law is practically an adoption of the English WORKMEN'S COMPENSATION LAW, it would logically follow that their interpretation of the phrases used should be governed by the English decisions as precedent, at least to a certain degree. An early case in England, still authority, in holding that an injury caused to C by the malicious act of A in throwing a piece of iron at B, which hit C, did not "arise out of employment," said: "the legislature did not intend to give compensation to the workman for injuries occasioned to him, while engaged in his employment, by an accident arising from any act which might be done by another workman engaged in the same employment, which might have no relation whatever to that employment. * * * An accident caused by the tortious act of a fellow workman having no relation whatever to the employment cannot be said to arise out of the employment." *Armitage* v. *Lancashire R. R.*, [1902] 2 K. B. 178. Accord, *Andrew* v. *Fallsworth Industrial Soc.*, [1904] 2 K. B. 32; *Challis* v. *London R. R.*, [1905] 2 K. B. 154; *Rowland* v. *Wright*, [1908] 1 K. B. 963; *Fitzgerald* v. *Clark*, [1908] 2 K. B. 796; *Craske* v. *Wigan*, [1909] 2 K. B. 635. See 25 HARV. L. REV. 401-530. A recent work defines acts arising out of employment and gives the circumstances under which the employer shall be held liable as follows: "It arises 'out of' employment when there is apparent to the railroad mind upon consideration, a causal connection between the conditions under which the work is required to be performed and the resulting injury. The causative danger need not be foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence." I BRADBURY, WORKMEN'S COMPENSATION LAW, 400. The few American cases upon this subject seem to follow the English decisions in holding that an injury such as the one in the principal case, meets the requirement "arising in the course of 'employment,'" but does not meet the further requirement "arising out of" the employment. *Gaun* v. *Great Southern Lumber Co.*, 131 La. 400; *Niece* v. *Farmers' Coöperative Co.*, 133 N. W. Rep. 878. A notable exception to this line of cases is *Halley* v. *Moosburger*, 93 Atl. 79, a New Jersey case decided in February, 1915, which held that an injury to one employee as the result of a playful act of another employee during working hours, was an injury arising both "in and out of" the course of employment. The basis of the decision was that, since it was only natural to expect young men and boys, full of life and activity, to play pranks upon one another, the injury was the result of a risk reasonably incident to the employment, and hence the accident was one "arising out of" the employment.

The case is opposed to the English decisions cited above, and seems an extreme holding, as there is no proof of any causal connection between the injury and the conditions under which the work was to be performed. The judge in the principal case attempts to distinguish this New Jersey holding from the case in hand. He bases his distinction on the fact that the floor where the injury occurred was improperly constructed. In any case, this was only the remote cause of the accident, the act of the fellow employee being the proximate cause, and as the proximate and not the remote cause governs, the distinction is without foundation.

The two cases are clearly in conflict, and although the New Jersey holding appeals to the sympathies, yet it must be admitted that it places an undue burden on the employer and one for which there is no legal justification. The principal case seems to express the better and more logical rule.

H. L. B.

IS A MEMORANDUM ADMISSABLE TO CORROBORATE A WITNESS' ORAL TESTIMONY WHEN IT IS NOT NECESSARY TO REFRESH HIS RECOLLECTION?—In a recent Vermont case—*Taplin & Rowell* v. *Clark*, 95 Atl. 491—after two witnesses had testified as to the items included in a sale, the plaintiff introduced (in one case over, and in the other without, the objection of the defendant) memoranda as to which the witnesses testified that they were made by them at the time of the sale, that they were correct, and that they did not refresh their memories. The court held that the memoranda were properly received as auxiliary to, or confirmatory of, the evidence of the witnesses.

While the holding of the Vermont court in this case is undoubtedly in accord with its previous holdings in *Lapham* v. *Kelly*, 35 Vt. 195, *Cheney* v. *Town of Ryegate*, 55 Vt. 499, and *Stillwell* v. *Farewell*, 64 Vt. 286, there is some question as to whether it is in accord with the weight of authority, and whether it is the better view.

A memorandum such as was introduced in the instant case is not evidence *per se*, for it is merely written hearsay, and is, therefore, within the principle of the hearsay rule. CHAMBERLAYNE, § 2756. Nor is this proposition controverted by the Vermont court. *Vide, Lapham* v. *Kelly* and *Stillwell* v. *Farewell, supra.*

Nevertheless, it is now a well-established rule that, when a witness testifies that he made a memorandum at a time when he had knowledge of the facts therein contained, and that it is correct, this memorandum becomes evidence as the embodiment of his testimony, even though it in no way serves to recall to his mind the facts which were once there. WIGMORE, § 754. This may be regarded as an exception to the hearsay rule based upon the necessity of the case. The admission of the memorandum in evidence is, however, accompanied by a guarantee of its trustworthiness which, together with the necessity of the case, form a basis for most of the various hearsay exceptions.

It is an equally well-established rule that a witness may use a writing to refresh his present hazy recollection, upon a showing that a reference to